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THE NORTHERN SECURITIES DECISION AND THE SHERMAN ANTI-TRUST ACT.

The Northern Securities case involved three questions:

FIRST: A question of statutory construction. What did the United States or so-called Sherman Anti-Trust Act mean? Did the Northern Securities Company, a corporation formed for the purpose of purchasing and actually owning a controlling interest in two competing railways engaged in interstate traffic, constitute a violation of the Anti-Trust Act, rightly interpreted?

SECOND: A question of Constitutional law. If the Anti-Trust Act was rightly interpreted, as applying to the Northern Securities Company, did Congress have the power to pass such an act?

THIRD: Did the United States Circuit Court or the Supreme Court of the United States have power to pass the decree which was granted in the case?[1]

[1] The decision has also been supposed by some persons to involve the so-called entity theory in the law of corporations and to be inconsistent with that theory: but this is a mistake. That theory, rightly understood, is not open to question. In legal contemplation and in the conception of laymen a corporation is an entity, created by law, having the capacity to acquire rights and incur liabilities, distinct and apart from the individual or individuals composing its membership. The contracts and torts of a corporation are its contracts and torts and not those of its members or stockholders. A transfer of property, real or personal, by a natural person to a corporation vests the legal title in the corporation and divests the title of the transferor precisely as in the case of a similar transaction between two natural persons, and the result would be the same, if the transfer to the corporation was made in return for all its stock issued to the vendor. It does not follow, however, that because the law recognizes the corporation as an entity with capacity for rights and liabilities of its own, it must cease to recognize its members or stockholders as persons with capacity for rights and liabilities of their own. In other words, the birth of a corporation does not involve the civil death of its members. If the alleged combination

The Anti-Trust Act (approved July 2d, 1890, U. S. Statutes at Large, p. 209) is entitled "An Act to protect trade and commerce against unlawful restraints and monopolies." It provides in effect as follows (the words in italics being the exact words of the act itself):

1. That *every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of* interstate or foreign *trade* or *commerce* is *illegal*, and that persons or corporations parties to such contract, combination or conspiracy are guilty of a misdemeanor, punishable by a fine of five thousand dollars or imprisonment for one year or both.

2. That *every person or corporation who shall monopolize or attempt to monopolize, or combine or conspire with another to monopolize any part of* interstate or foreign *trade* or *commerce* is also guilty of a misdemeanor.

3. That the United States Government may institute proceedings in equity *to prevent and restrain violations of the act.*

4. That any property owned under any contract or by any combination or pursuant to any conspiracy, *mentioned in the first section of the act* (which section does not refer to monopolies), *and being in the course of transportation in interstate or foreign commerce*, is forfeited to the United States.

5. That any person or corporation injured in business or property as the result of the *doing of anything either forbidden or declared to be unlawful* by the act may sue the offend-

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or conspiracy preceding the formation of the Northern Securities Company constituted an offense against the Anti-Trust Act, the Northern Securities Company itself, formed for the purpose of carrying into effect that combination or conspiracy, must have offended against the act. A gambler may divest himself of title to property by conveying it to a corporation and thereby divest himself of some of the rights and liabilities attaching to ownership, but he could not escape the provisions of the penal law applicable to gambling by conveying his business to the corporation and thereafter conducting his business in the corporate name, and the corporation itself, if it continued the unlawful business, would be amenable to the law and subject to a decree of forfeiture and dissolution. Messrs. Morgan, Hill and associates, by transferring the stock of the Northern Pacific and Great Northern Companies to the Northern Securities Company, did divest themselves of the title to that stock and vested it in the Northern Securities Company. But if their combination, resulting in the acquisition of the power to control railway traffic, was, as the United States contended, an offense against the statute, they could not escape the provisions of the statute by vesting that control in a corporation, and the corporation itself by combining with them to give effect to their purposes would itself violate the provisions of the act.

ing person or corporation and recover three times the amount of complainant's damages.

From this summary of the law, it will be seen that it is aimed at two things: "restraints of trade or commerce," which are declared to be unlawful or illegal and are governed by the provisions of the first section of the act, and the acts of "monopolizing or combining or conspiring to monopolize," which are not in terms declared to be unlawful or illegal, but are simply forbidden and are governed by the provisions of the second section of the act. It will also be perceived that the statute provides for five different remedies or penalties for violation of the act,

(A). Every contract or other arrangement restraining interstate trade or commerce is illegal and non-enforcible among the parties thereto.

(B). Every person restraining interstate trade or commerce or monopolizing it or attempting to monopolize it is guilty of a crime.

(C). The United States may institute proceedings in equity to restrain violations of the act.

(D). Persons injured by the restraint of trade or commerce or by the monopoly may sue to recover damages.

(E). Property owned under any contract or other arrangement in restraint of trade (but apparently not by a monopoly) and in the course of transportation between the States or a State and a foreign country is forfeited to the United States.

All these five remedies or penalties apply to the contracts, combinations and conspiracies mentioned in the first section of the act, but only two of them (B) and (D) clearly and expressly apply to the acts of monopolizing or combining or conspiring to monopolize mentioned in the second section of the act.

In order to ascertain the meaning of this statute, we must, according to familiar canons of interpretation, study the situation of affairs to which the statute applied, and if any of its words had acquired a fixed meaning at common law, we must interpret those words as embodying that

meaning. Prior to the approval of this act on July 2d, 1890, three classes of transactions had received attention in legal proceedings.

I. Contracts between A and B by which, in connection with the sale or purchase of property or the employment of services, one of the parties binds himself not to trade in competition with the other.

II. Contracts between A and B by which, while continuing in business as owners of independent enterprises, they bind themselves to sell at prices agreed upon between them, or by which, in addition to agreeing to maintain prices, they bind themselves, for the purpose of facilitating the maintenance of prices, to pool earnings, or to divide certain territory between them and to restrict the business of each to his own territory, or, in general, to conduct their business subject to the direction of a committee or the rules or regulations of an association, this committee or association having in some instances the power to order an absolute cessation of work, if deemed best for the interests of the combination. The transactions of this class have been further divided into the following sub-classes:

(a). Contracts restricting competition between persons engaged in the business of transportation, as common carriers, or in some other *quasi* public business, as that of gas or water companies and the like.

(b). Contracts restricting competition in articles of " prime necessity or common use."

(c). Contracts restricting competition in commodities other than those of " prime necessity or common use."

III. Contracts restricting competition of the character of the contracts included in Class II above, but having the additional feature of " tending to monopoly." The word monopoly is here used in the sense not of an exclusive privilege, granted by the government, but in the sense of a power, secured by contract, of exercising a practically exclusive control over a market and the prices. If A, B and C, individuals or corporations, enter into a contract for

regulating the competition between them and as the result of their union under this contract acquire the power practically to dominate their particular markets, they are said to constitute a monopoly.

In political discussion and sometimes in judicial utterances a single individual, or a partnership or corporation, if he or it possesses this power of dominating the market, is said to be a monopolist or monopoly, but the fundamental legal distinction between these two things, namely between a power secured by a union under a contract, and a power secured by a union of property interests, will be pointed out hereafter.

The first two kinds of transactions, namely, those of Class I and Class II, have both been designated as contracts "in restraint of trade." This nomenclature, however, has been criticised. It has been suggested that the contracts of Class I are alone properly called contracts in restraint of trade, and that the contracts of Class II should be called contracts in restraint of competition. It has also been held that the common law test of reasonableness should apply only to the contracts of Class I and should not apply to the contracts of Class II.[1] It seems to the writer, however, that all these contracts, under a wider generalization, properly belong to one and the same class and are properly designated as contracts in restraint of trade. Each of the contracts has a tendency to diminish trade, in the one case, by limiting the number of traders, and in the other case, by limiting the competitive activity and effectiveness of the traders, and that, in the eye of the law, is the evil which makes these contracts void as against public policy. The courts, looking primarily at the interest of the consumer, and accepting the familiar maxim that competition is the life of trade, as tending to enlarge trade and diminish prices, consider every contract, tending unreasonably to restrict trade and therefore to enhance prices, as opposed to public policy. When these contracts of Class I were first passed upon by the courts, it seems that they were all considered as in restraint of trade and therefore void. But as soon as it was discovered that, while the interest of the consumer

[1] U. S. *v.* Addyston Pipe & Steel Co. (1898) 54 U. S. App. 723.

for a time might be promoted by absolutely unrestricted competition, the interests of the producing or trading class would be sacrificed, and that in the long run, therefore, trade would be hampered and restricted, unless reasonable restrictions were permitted, the courts introduced into the law the test of reasonableness. Applying this test of reasonableness, they held that the question in every case was whether the particular restriction was more than is required to afford a fair protection to the party in whose favor it was imposed. In other words, in deciding between the conflicting interests of the consumer on the one hand, and of the producer or trader on the other, the courts took a broader view of the interests of society. They held that a restriction, although involving a temporary increase of prices and so, temporarily at least, affecting unfavorably the interests of the consumer, was valid and enforcible, if reasonably necessary for the protection of the producer or trader and through him of trade itself, upon which also in the long run the interests of the consumer himself depended. This test of reasonableness, as we have stated, was introduced into the law in connection with the contracts of Class I, but is there any reason why it should not also be applied to the contracts of Class II? It seems entirely artificial and indefensible to support the test of reasonableness with respect to the contracts of Class I, on the ground that the restriction is ancillary to a lawful contract, and to deny its applicability to the contracts of Class II, because the restriction itself is the primary purpose of the contract. Are not property rights entitled to as much protection as contract rights? Is not invested capital a lawful interest, deserving the law's care and protection as much as a lawful contract of sale? If it is not against public policy, but, on the contrary, promotive of trade in a large sense, that producers or traders should be permitted to sell their property and retire from business, and in connection therewith to impose upon themselves reasonable restrictions, is it not also promotive of trade and not contrary to public policy that competing producers and traders should be permitted to regulate their competition by such reasonable restrictions as may be necessary to protect their property interests and

their invested capital? What can be more absurd than to say to a trader, who has found that the stress of competition, once supposed to be the life of trade, is the death of his trade: "You may sell your business, and in order to realize a better price, you may impose upon yourself reasonable restrictions, but if you prefer to continue in business, you cannot impose upon yourself any restrictions at all, even though without restrictions your business will be ruined. If you enter into a lawful contract for the sale of your property, you may provide for a restriction as ancillary thereto, but if you wish to retain your property and protect your invested capital, that is not such an interest in the eye of the law as would support a reasonable restriction as ancillary thereto."

While all this seems very clear on principle, it must be conceded that the decisions and dicta in the several States are vague and conflicting, and it is difficult to lay down any general doctrine on the subject.[1] So far as the United States Supreme Court is concerned, Mr. Justice BREWER in his concurring opinion in the Northern Securities case (and we may assume that at least a majority of the court is in accord with him) announced that the Anti-Trust Act must be hereafter limited in its application to unreasonable restrictions of trade or competition. At the same time, however, he reaffirmed his conviction that the Trans-Missouri Freight Association,[2] Joint Traffic Association[3] and the Addyston Pipe & Steel Company[4] cases were rightly decided, because the contracts there under consideration were unreasonable restraints. The Trans-Missouri Freight and Joint Traffic Association cases belonged to Class II, (a); they involved contracts between railway companies engaged in interstate traffic, providing for the maintenance of agreed rates, and being reasonable should have been

[1] Shrewsbury *v.* L. & N. W. R. R. (1851) 16 Jurist 311; Hilton *v.* Eckersley (1855) 6 E. & B. 47; Ontario Salt Co. *v.* Merchants' Salt Co. (Ont. 1871) 18 Grant Ch. Rep. 540; Arnot *v.* Pittston & Elmira Coal Co. (1877) 68 N. Y. 558; Cohen *v.* Berlin & Jones Co. (1901) 166 N. Y. 292; Park & Sons Co. *v.* Nat'l Druggists Assoc. (1903) 175 N. Y. 1; Brown & Allen *v.* Jacobs Pharmacy Co. (Ga. 1902) 57 L. R. A. 547; Craft *v.* McConoughy (1875) 79 Ill. 346; Moore *v.* Bennet (1892) 140 Ill. 69; Nester *v.* Cont. Brew. Co. (1894) 161 Pa. St. 473; Cent. Shade Co. *v.* Cushman (1887) 143 Mass. 353; Santa Clara Co. *v.* Hayes (1888) 76 Cal. 387; Herriman *v.* Menzies (1896) 115 Cal. 16.

[2](1897) 166 U. S. 290. [3](1898) 171 U. S. 505. [4](1899) 175 U. S. 211.

sustained. It was held, however, that they were contracts "tending to monopoly", and if so they belonged to Class III, being contracts restricting competition and involving the additional feature of monopoly. It was held, therefore, that these agreements were illegal and void, although the rates provided for appeared to the court to be reasonable and the whole object of the agreement was to maintain reasonable rates and to prevent the evils incident to unrestrained competition among railway companies. As competing railway companies could not by any possibility make more reasonable contracts than those which were condemned in those two cases, it is evident that this apparent limitation of the scope of those cases will not lead to any practical results. In other words, it does not justify at all the hope that competing railway companies can by any device form a traffic association which will be valid under the Anti-Trust Act. The Addyston Pipe & Steel Company case belonged to Class II, (b); it involved a contract among six competing corporations engaged in the manufacture of cast iron pipe, providing rules and regulations for selling pipe and fixing and maintaining prices. In a lengthy opinion in the court below, the learned circuit judge said:

"Upon this review of the law and the authorities, we can have no doubt that the association of the defendants, however reasonable the price they fixed, however great the competition they had to encounter, and however great the necessity for combining themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, *because in restraint of trade and tending to a monopoly;* but, the facts of the case do not require us to go so far as this, for they showed that the attempted justification of this association on the grounds stated is without foundation."

In other parts of the opinion the idea is expressed that the test of reasonableness applies only to Class I, but this was a dictum, as the court found that the contract was in fact unreasonable. In this case in the United States Supreme Court, Mr. Justice PECKHAM, delivering the unanimous opinion of the court, cited and quoted with approval this opinion of the circuit judge, but as the statement in regard to the test of reasonableness not being applicable to contracts of Class II, (b) was a dictum only, it is impossible to say that the Supreme Court has in

effect approved this doctrine. In fact, in the light of Mr. Justice BREWER'S statement in his concurring opinion in the Northern Securities case, to the effect that the test of reasonableness must be applied, we are justified in assuming that restrictions in cases belonging under Class II, (b), unless they also belong under Class III, that is, tend to create a monopoly, would be sustained as reasonable. It would probably be difficult to provide for any effective association among large manufacturers more reasonable than the association passed upon by the court in the Addyston Pipe & Steel Company case, and therefore the apparent limitation of the scope of the Anti-Trust Act, as applicable to contracts of Class II, (b), is not so fundamental as one might assume, for the court might find either that the particular contract was unreasonable, or involved the monopoly feature. Apparently, therefore, we are not justified in thinking that large competing manufacturing companies any more than competing railway companies can form an effective association for regulating prices which will be valid under the Anti-Trust Act.[1] If this conclusion is correct, it would seem that the application of the test of reasonableness will not substantially affect the rulings of the court except in minor contracts of Class II, (b) and in contracts of Class II, (c). The contracts of Class II, (c), are, however, of minor importance, and in some cases it has been denied or questioned whether there is any distinct class of this kind, that is, whether there are articles of commerce, which are, as they have been elegantly termed, mere "luxuries or appendages of vanity," as distinguished from articles of "prime necessity or common use."[2]

Referring now to the contracts mentioned in Class III above, namely, "contracts tending to monopoly," one may ask, whether these also, by a wider generalization, may not

[1] See, however, statement of Mr. Justice PECKHAM in U. S. *v.* Joint Traffic Ass'n. (1898) 171 U. S. 505 at page 567: "It may also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade." If "restraint of trade" is used here in the sense of including "monopolizing," the result would be very important, but it is probably used in its strict sense of restricting competition.

[2] Cummings *v.* Union Co. (1900) 164 N. Y. 401; U. S. *v.* Addyston Pipe Co. (1898) 54 U. S. App. 723.

be brought under the same class as contracts in restraint of trade. It would seem not, although they are sometimes confounded. The Anti-Trust Act itself makes a distinction between unlawful restraints and monopolies, and there is, in fact, a fundamental difference between them.

Contracts in restraint of trade may tend to a monopoly, and a monopoly may restrain trade. But restraint of trade may be so reasonable as not to tend to a monopoly, and a monopoly may be so reasonable as not to restrain trade or increase prices. The Standard Oil Trust, even if it be conceded that it has reduced prices, and that while ruthlessly crushing rivals, it has on the whole increased trade, would be considered a monopoly, because it is supposed to have the power to control its markets and therefore the prices of its products. As we have seen, the evil of contracts involving unlawful restraint lies in the injury to the consuming class, while the evil of a monopoly, in the opinion of those jurists and politico-economists who condemn these so-called "virtual" monopolies, is not so much the injury to the consumer, but the injury to the interests of the State as a whole, to be apprehended as a result of the concentration of power in the hands of a few men. Hence a monopoly to reduce prices, and even one which should permanently maintain lower prices than would be likely to exist in the long run under a system of free competition among small traders, is regarded as an evil. It is so regarded because it involves (a) an excessive concentration of power and wealth in the hands of a few, and (b) diminishes the number of small traders or capitalists, the class having the independence and intelligence which is assumed to be required as the basis of free institutions. Such being considered to be the evils of monopolies, it is evident that the test of reasonableness does not apply to them, as it does to the other two classes of contracts above mentioned. According to this reasoning, a monopoly is in and of itself evil, whether for the time being it is behaving itself reasonably and virtuously or not. In other words, a monopoly is opposed to public policy and is to be condemned, whether it is reasonable or unreasonable and whether exacting exorbitant prices or maintaining a system of prices so low that

no small trader can live under them—just as to the lover of free institutions a despotism is offensive, whether the despot is benignant or cruel. And it is not to be assumed from what Mr. Justice BREWER has said about reasonableness, that he would uphold a reasonable monopoly.

Read in the light of the foregoing propositions, the meaning of the Anti-Trust Act becomes reasonably plain. In the first place, it was leveled at unreasonable restraints, that is, the kind of unreasonable restraints that may be involved in the contracts mentioned in Class I and Class II above. In the second place, it was leveled at restraints tending to a monopoly, that is, the kind of restraints involved in the contracts mentioned in Class III, and, on just principles of statutory construction, this statute should not have been interpreted as applying to anything else. As we shall soon see, contracts of these three classes were at common law simply illegal in the sense of being non-enforcible as among the parties thereto, and the manifest object of this Anti-Trust Act was simply to make them crimes, in addition to being non-enforcible, and to give third persons a right of action for damages.

So far as the contracts of Class I and II are concerned, it should have been limited to such contracts only as involved unreasonable restrictions, but so far as the contracts of Class III are concerned, it could be applied to all such contracts without regard to the question of reasonableness, since at common law all such contracts were null and void, whether reasonable or unreasonable. For the reasons above set forth, there is, however, no basis for a distinction in applying this test of reasonableness, as between Class I and Class II. As a matter of authority, however, we have seen that the test of reasonableness is not applied to contracts between railway companies of Class II, (a), for the reason that contracts regulating traffic rates between competing railway companies are supposed to tend towards monopoly. According to the recent dictum of Mr. Justice BREWER, the test of reasonableness is to be applied, however, to Class II, (b) & (c), but, as we have seen, the application of this test to Class II, (b) will have less important practical results than we might suppose, because in restrictions of that class the court would probably hold as they held in the

Addyston Pipe & Steel Company case, either that the restrictions were in fact unreasonable or that they tended to a monopoly. What the learned Justice in delivering the opinion of the court in the Joint Traffic Association case said with respect to agreements between competing railway companies would probably be applied to agreements between large competing manufacturing or trading corporations. After stating that ordinary freedom of contract did not include the right to combine for the purpose of "stifling competition," the learned Justice said at page 570:

"This is so, even though the rates provided for in the agreement may for the time be no more than reasonable. They may easily at any time be increased. It is a combination of these large and powerful corporations, governing vast sections of territory, influencing trade throughout the whole extent thereof, and acting as one body in all the matters for which the combination exists, that constitutes the alleged evil, and in regard to which, so far as the combination operates upon and restrains interstate commerce, Congress has power to regulate and to prohibit."

It is plain that the Northern Securities case does not belong to either Class I, Class II or Class III, for there is no contract in the Northern Securities case affecting trade or commerce or restricting competition therein; *a fortiori*, there is no contract in the case affecting interstate trade or commerce. The only contract in the case, if any, is a contract of subscription to the shares of the stock of the Northern Securities Company, and the subscription to shares of stock in a corporation incorporated under State laws, according to the well settled law established by the United States Supreme Court prior to the Northern Securities decision, is not a contract affecting interstate trade or commerce.

Judge JACKSON, afterwards justice of the Supreme Court, in deciding that the formation of the Whiskey Trust did not involve an offense against the Anti-Trust Act, held: [1]

"But Congress certainly has not the power or authority under the commerce clause, or any other provision of the Constitution, to limit and restrict the right of corporations created by the States, or the citizens of the States, in the acquisition, control and disposition of property."

In United States *v.* E. C. Knight Co.,[2] Chief Justice FULLER, delivering the opinion of the court, to the effect that

[1] *In re* Greene (1892) 52 Fed. Rep. 104, at p. 112.

[2] (1895) 156 U. S. 1.

the formation of the Sugar Trust, although conceded to be a monopoly, did not involve an offense against the Anti-Trust Act, re-affirmed this opinion of Judge JACKSON, holding that by the Anti-Trust Act Congress did not "attempt to limit and restrict the rights of corporations created by the States, or the citizens of the States, in the acquisition, control or disposition of property."

In United States *v.* Joint Traffic Association[1], Mr. Justice PECKHAM at page 567 said:

> "Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership."

If there had been an agreement between the Northern Securities Company and those who promoted it by which the Northern Securities Company bound itself to maintain uniform rates on the Northern Pacific and Great Northern Railroads, or if there had been a contract between the Great Northern and Northern Pacific Railway Companies to the same effect, we should then have had a case within Class II, (a), and the decisions in the Traffic Association cases would have required the court to hold that the agreement was illegal and void. But there was no such agreement. There was simply a sale of stock, and therefore the decisions in the Whiskey Trust and Sugar Trust cases, approved by Mr. Justice PECKHAM in the Joint Traffic Association case, logically required the court to hold that there had been no offense against the statute.

It remains to consider, however, whether the Anti-Trust Act may not have a broader scope than we have hitherto conceded; whether, by force of the second section relating to monopolies, it may not include other transactions than those which are comprised within the three classes of contracts above mentioned, and if so, whether the Northern Securities case, although not involving a contract, may not be brought within the act. It is true that the Anti-Trust Act in its second section declares the act of monopolizing to be a crime, and it may be argued that such an act may be performed by a single person or corporation. It is also true that, in political discussions and occasionally in

[1] (1898) 171 U. S. 505.

judicial utterances, the distinction between a monopoly resulting from a combination of property interests has been confounded with a monopoly resulting from a combination by contract. The evil of a contract tending to a monopoly, as we have seen, was assumed to be the existence of the power to control the market and not merely the exercise of that power, and from this it was perhaps easy to fall into the error of assuming that a single individual or a corporation which possessed the same power involved the same evil and was equally offending against the law, but this assumption entirely overlooks the origin of the common law doctrine as to restraints of trade or competition, and also overlooks essential legal distinctions.

At common law, a contract in restraint of trade or competition was simply non-enforcible as between the parties to it. It was not a crime, and did not in general give a third person any cause of action. When parties to such a contract came before a court seeking to enforce it, and claiming rights under it, the court had a right to refuse to enforce it, if it appeared to be opposed to public policy as recognized by law, but the right to refuse to enforce a contract is a very different thing from the right to take affirmative action. The courts never assumed to take affirmative action with respect to contracts opposed to public policy or to divest property rights which had been once acquired thereunder; *a fortiori*, the courts never assumed to set any limits to the acquisition of wealth by an individual or a corporation. It is perfectly obvious that it is a legislative and not a judicial function to fix such limits; to determine, for instance, whether a manufacturing company shall be limited to the ownership of one plant or whether a "journalist" shall be limited to the ownership of one newspaper. Hence, at common law, there was never any doubt that the formation of a partnership, however large and powerful, was perfectly legal, and, though formed by the union of competing traders, it was never supposed to constitute a monopoly. If A, B, and C, competing traders, may combine and conduct their business under one consolidated firm or unincorporated association, such firm could unquestionably convert itself into a corporation, and there is no logical ground for saying that, without first forming

the firm, they could not combine and form themselves at once into a corporation. A state legislature, having the power to create corporations, may create them subject to limitations as to the amount of property they may acquire, and, it may be conceded, a state legislature may also provide for the dissolution of corporations which offend against anti-monopoly laws.[1] But there is no more logical basis for a court to fix limitations as to the acquisition of property by a corporation than by an individual, and it cannot do so without destroying the fundamental limitations of judicial action. This obvious distinction, however, has undoubtedly been overlooked in political discussions, and sometimes even in judicial utterances.[2]

These judicial utterances, however, were for the most part dicta merely, and prior to the passage of the Anti-Trust Act, there had been no actual decision holding that a corporation formed for the purpose of monopolizing trade, or actually monopolizing it, after its formation, was illegal, and subject to a decree of forfeiture and dissolution. In the Sugar Trust case in this State, the Court of Appeals,[3] expressly refused to decide the case on the ground of monopoly, repudiating in that respect the opinion of the court below. The sound doctrine has been stated nowhere better than in the Chancery Court of New Jersey.[4] The court there said:

"Under such powers, it is obvious that a corporation may purchase the plant and business of competing individuals and concerns. The legislature might have inhibited such powers or imposed limitations upon their use. In the absence of prohibition or limitation on their powers in this respect, it is impossible for courts to pronounce acts done under legislative grant to be inimical to public policy. It follows that a corporation empowered to carry on a particular business may lawfully purchase the plant and business of competitors, although such purchases may diminish, or for a time at least, destroy competition. Contracts for such purchases cannot be refused enforcement."

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[1] People *v.* Milk Exchange (1895) 145 N. Y. 267.

[2] People *v.* North River Sugar Refining Co. (1889) 54 Hun 354; Richardson *v.* Buhl (1889) 77 Mich. 632; State *v.* Distilling Co. (1890) 29 Neb. 700; State *v.* Standard Oil Co. (1892) 49 Oh. St. 137; People *v.* Chicago Gas Trust (1889) 130 Ill. 268; Distilling Co. *v.* People (1895) 156 Ill. 448.

[3] People *v.* North River Sugar Refining Co. (1890) 121 N. Y. 582.

[4] Trenton Potteries Co. *v.* Oliphant (1899) 58 N. J. Eq. 507 at 524. See also Diamond Match Co. *v.* Roeber (1887) 106 N. Y. 473.

There can be no doubt, therefore, that if a suit had been instituted in New Jersey in its State Court, the Northern Securities Company could not have been there suppressed, as it had acted distinctly within its legal rights. If then, the Northern Securities Company was not illegal under the law of New Jersey, and not subject to dissolution or forfeiture by the sovereign State of New Jersey, it could not be illegal under the laws of the United States and subject to dissolution or forfeiture by the United States Government.[1] Could the company, however, be indirectly suppressed and enjoined from continuing its business or exercising its rights of ownership acquired under the State law? This question has been completely answered in the lucid and convincing dissenting opinion of Mr. Justice WHITE. Under the commerce clause of the United States Constitution, Congress has no power to interdict any action by a State or by individuals within the State, which does not *directly* affect interstate commerce. Such action of the State or individuals may impose in one sense a burden upon interstate commerce, but such burden cannot be removed by the power of the United States, unless it directly affects interstate commerce, as, for example, a contract regulating the prices of interstate traffic affects it. This proposition has been decided again and again by the United States Supreme Court and most strikingly in the Sugar Trust case and the other cases already referred to.[2] It is to be noticed, also, that the Anti-Trust Act itself seems to recognize a distinction between the act of monopolizing, a thing forbidden merely, and a contract in restraint of trade, a thing not only forbidden, but declared unlawful. Considering the limitation of the powers of Congress, it seems a just and reasonable conclusion that this distinction was made with due regard to that limitation, and that Congress rightfully assumed that it had no power to declare illegal any monopoly formed under the authority of the laws of a State, and that as it had no power to dissolve a corporation constituting a monopoly, so it had no power practically to dissolve it by enjoining it from exercising and enjoying its

[1] United States Vinegar Co. *v.* Schlegel (1894) 143 N. Y. 537.

[2] See also, Hopkins *v.* United States (1898) 171 U. S. 578, and other cases cited in the dissenting opinion of Mr. Justice WHITE.

rights. If this conclusion is correct, the only possible question that is open, is, whether either the Northern Securities Company itself or its promoters could be adjudged guilty of a crime. If, however, the Northern Securities Company was itself a legal enterprise under the laws of New Jersey, it is difficult to see how it or a combination to form it could under the United States laws be a criminal act. The general result is that the Anti-Trust Act, rightly interpreted, did not apply to the Northern Securities Company; if it had been intended to apply to such a case, it would be unconstitutional.

Finally, it should be said, that the position of the Northern Securities Company, considered as a monopoly, was, with respect to the maintenance of uniform rates, not quite so strong as it is generally assumed. It had the power, it is true, to elect boards of directors for the two competing railway companies, but does it follow that the directors of the two companies would enter into an illegal contract for the maintenance of rates? As a matter of fact, under the laws of the States by which the Northern Pacific and Great Northern Railway Companies were respectively created, the board of directors of each was required to be composed of persons not acting as directors of another competing company. Boards of directors of the two companies, therefore, would have to consist of different persons, and, while we must assume that these two boards would act, in general, in harmony with each other, they could make no agreement or combination to maintain rates without violating both the state laws and the United States Anti-Trust Act. If they should attempt to make such an agreement or combination, then and not before would have been the time for the courts to act. It may be said that this remedy would be practically ineffective and too slow, but it is better to be ineffective and too slow, rather than to break down by judicial legislation, for the purpose of suppressing what is assumed to be a great evil, the well defined limitations between legislative and judicial functions, and between the power of Congress and the rights of the States. The existence of the Northern Securities Company was doubtless regarded as an evil, whether rightly or

wrongly, by an overwhelming majority of the people of this country, but it is better that the evil should be permitted to remain than that it should be suppressed by the violation of the fundamental principles of our law.

If, however, it should be conceded that the acts preceding the formation of the Northern Securities Company or the Northern Securities Company itself came within the scope of the Anti-Trust Act in the sense of being subject to its penal provisions or the remedy by injunction, on no possible theory can the actual decree granted in the case be sustained. By the terms of that decree the Northern Securities Company is prohibited from voting any portion of the stock of the two controlled companies or from receiving any of the dividends on said stocks, and that, too, *whether these dividends were derived from purely local traffic or interstate traffic.* Thus, although the Northern Securities Company's ownership and title are recognized as beyond the reach of the power of Congress or the United States Court, the court assumed to deny to that company all the substantial rights of ownership! Having denied the rights of ownership, the decree then provides that the Northern Securities Company *may* return or transfer "to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said Railway Companies, and may make such transfer or assignments of such stock to such person or persons as now may be the holders and owners of its own stock, '*originally* issued in exchange or in payment for the stock of the Great Northern and Northern Pacific Railway Companies.'" According to this, the Northern Securities Company may do one of two things: If persons can be found who are now the holders of its own stock, *originally* issued in exchange or payment for the stock of the Great Northern and Northern Pacific Railway Companies, it may return the last-mentioned stock to such persons; but if such persons cannot be found, it may return or transfer such stock to the Northern Pacific Railway Company and the Great Northern Railway Company respectively, leaving it to those companies to make distribution of the stock. These provisions, however, are permissive merely, and not compulsory, and it would seem,

therefore, that unless the terms of the decree are modified in this respect, the matter of the distribution of the stocks is within the control of the stockholders themselves of the Northern Securities Company, and that they are not bound to follow the method of distribution, suggested and permitted by the courts. The object of the suit being practically to suppress the company, can the Government object to its stockholders distributing its assets pro rata, substantially in the same way as they would upon a voluntary dissolution of the corporation?

This extraordinary decree was asked for by the Government on the basis of two broad propositions. *First:* That the mere possession of the power to control traffic or business of any kind constituted the offense of monopoly. In other words, as soon as an association of men or a corporation became big and strong enough to control its particular line of business, it became a monopoly and illegal. *Secondly:* If a monopoly came into existence under state laws, and although expressly authorized by state laws, Congress could suppress it as a burden upon interstate commerce. Happily for the country and for the preservation of the rights of the States, these extraordinary contentions were rejected, although the Government succeeded in getting the decree for which it asked. It is not clear that even Mr. Justice HARLAN fully accepted the theory of the Government's case, as originally presented in its printed brief, or that he would carry his decision to its logical conclusion in another case, for he himself points out, in his own opinion, that the Northern Securities Company came into existence only for the purpose of suppressing competition and that the transfer of the stocks of the Northern Pacific and Great Northern Companies was only in form and not in fact an investment by the Northern Securities Company. This would seem to distinguish and perhaps was intended to distinguish the Northern Securities case from that of the other great railway companies in this country, which, during the past decade, have invested so largely in the stocks of competing railway companies. But whatever may be the opinion of Mr. Justice HARLAN, Mr. Justice BREWER, while concurring in the result, makes it entirely clear that he agreed with the four dissenting judges

in absolutely rejecting the reasoning upon which the Government's case was based. The justification of the decree, in his judgment, rests upon the following special grounds: That the Northern Securities Company was formed solely for the purpose of destroying competition; that it was conceived and brought forth in sin; that it had no cash in its treasury or other means of its own, and the transfer of stock to it was a mere incident to the illegal purpose formed *prior* to its incorporation, and not a *bona fide* investment of corporate funds; that the merging of the control and destruction of competition between the Great Northern and Northern Pacific Railway Companies was in effect opposed to the laws and the public policy of the States under which these Railroad Companies were incorporated, and, therefore, there was no conflict in this case between the jurisdiction of the State and the jurisdiction of the United States. In other words, the decree, while in conformity with the general spirit of the Anti-Trust Act, also carried into effect the purpose and policy of the States of Minnesota and Wisconsin.

The learned Justice further stated at the conclusion of his opinion (evidently for the purpose of emphasizing the limited scope of the actual decision, and his repudiation of the startling doctrine advanced by the government):

"I have felt constrained to make these observations for fear that the broad and sweeping language of the opinion of the court might tend to unsettle legitimate business enterprises, stifle or retard wholesome business activities, encourage improper disregard of reasonable contracts, and invite unnecessary litigation."

As a result of the foregoing, it would seem, that the following propositions may be stated with reasonable certainty:

1. The Northern Securities decision is wrong on principle, involving a wrong interpretation of the Anti-Trust Act and a wrong interpretation of the powers of Congress under the Constitution; and, with all deference, the actual decree rendered, in its full length and breadth, is absolutely indefensible and violative of fundamental principles.

2. The United States Supreme Court, as now constituted, will not carry this decision to its logical conse-

quences. The decision will be recognized, and more and more clearly as time goes on, as a piece of judicial legislation, resulting from the assumed necessity of suppressing what was supposed to be a great evil, and of averting greater evils of a similar character, which it was feared this one might produce.

3. The primary practical result of the Northern Securities decision will be simply that the Northern Securities Company itself will be practically suppressed and all similar plans of merger, if there were any such, must be abandoned; but the actual concentration of power and suppression of competition which the Northern Securities Company was supposed to secure will either continue to exist in the hands of the promoters of that enterprise or of those controlling a still larger combination of railway interests.

4. The Pennsylvania Railway Company, the New York Central & Hudson River Railway Company, and other large railway companies, which have consolidated with or bought control of competing railway companies, are safe from attack by the United States Government under the existing Anti-Trust Act.

5. The large industrial combinations, such as the Standard Oil Company, United States Steel Company and others, are also safe from attack by the United States Government under existing laws.

6. Joint traffic associations between competing railway companies are illegal, even though they provide simply for the maintenance of reasonable rates, because the union of railway companies is supposed to constitute a monopoly.

7. Joint selling agencies and associations for maintaining prices among competing manufacturing or trading companies are legal, if they are in all respects reasonable, and the companies are not so big as to constitute a monopoly. If they do, however, constitute a monopoly, then they are illegal, whether reasonable or unreasonable, because the test of reasonableness does not apply to monopolies.

The writer has not intended to express any opinion on the merits of the Trust question. That question presents

grave problems and must be soberly considered. He has simply endeavored to study the situation as it exists to-day from the view-point of a lawyer. The knowledge that comes from such study is the first prerequisite to a right determination as to the remedy. The art of statesmanship, like the art of surgery, should be based on exact knowledge and should be practiced only by those who are possessed of such knowledge. It is so easy, in our haste to apply a remedy for evils, real or imaginary, existing in our bodies physical or politic, to aggravate instead of removing them. The agitation of the Trust question in modern times, vociferously supported by quacks and charlatans, and stimulating ill-considered action by legislatures and courts, is an apt illustration. If it had not been declared, as it was declared in the Addyston Steel & Pipe case, that an association of manufacturers, however innocent and however necessary to prevent "financial suicide," was illegal, there would have been no necessity, or at least much less inducement for the formation of the United States Steel Company. If it had not been held, as it was held in the Traffic Association cases, that agreements to maintain uniform and reasonable rates among competing railway companies, were illegal, there would have been no necessity or at least much less inducement for the formation of the Northern Securities Company or for adopting the modern policy of community of interest, involving the buying of control of or a dominant influence in competing railway companies. Having necessitated or at least stimulated this policy of combination, we now say that those who have been joined together must be put asunder. Is this sensible? Some one has said that the Northern Securities decision was not only good sense, but also good law, and for the public welfare. It is respectfully submitted that the law is now good only so far as the Northern Securities Company itself is concerned and cases involving precisely similar facts, that the Government's law was bad both before the decision and since, as the court, while granting the decree asked for by the Government, rejected its legal propositions. As for the public welfare, it may be that the attack upon the Northern Securities combination checked the wild speculative spirit which preceded its formation; but would not

natural forces have taken care of that, as they have taken care of Mr. Sully and his cotton bubble, and in times past of all the blowers of speculative bubbles? Whether it will have the effect of preventing the suppression of competition and the maintenance of rates between the Northern Pacific and Great Northern Railway Companies is yet to be determined.

So far as now appears, one of two things seems likely to happen: Either the practical concentration of power and control will remain in the hands of the promoters of the Northern Securities Company, or it will be superseded by a still more formidable concentration of power, namely, by the practical union of the Northern Pacific, Union Pacific and Southern Pacific Companies.

GEORGE F. CANFIELD.